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In the Supreme Court of the United States

OCTOBER TERM, 1944

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS

v.

DUQUESNE WAREHOUSE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

DUQUESNE WAREHOUSE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Railroad Retirement Board, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on April 24, 1945 (R. 328), affirming the judgment of the District Court for the Southern District of New York (R. 292–293) setting aside and annulling a decision of the Railroad Retirement Board (R. 19–45) that the Duquesne Warehouse Company was an "employer" within the meaning of the Railroad Retirement Act.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 302–323) have not yet been reported. The opinion of

the District Court (R. 282–292) is reported in 56 F. Supp. 87.

JURISDICTION.

The opinion of the Circuit Court of Appeals was entered on March 12, 1945 (R. 302). A petition for rehearing filed by the Board was denied on April 23, 1945 (R. 327). The judgment was entered April 24, 1945 (R. 328). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a warehouse company wholly owned by the Pennsylvania Railroad and engaged primarily in storage for shippers and consignees of goods transported or to be transported on the Pennsylvania is a company owned by a carrier and "which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, storage, or handling of property transported by railroad" within the meaning of Section 1 (a) of the Railroad Retirement Act of 1937.

STATUTE INVOLVED

The statute involved is Section 1 (a) of the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. Section 228a (a), which is set forth in Appendix A, *infra*, pp. 10–11.

STATEMENT

In a proceeding to determine whether respondent Duquesne Warehouse Company was an employer

covered by the Railroad Retirement Act the Board held a hearing [1] and found that respondent was such an employer. Respondent thereupon brought suit in the District Court for the Southern District of New York to compel the Board to set aside its order, pursuant to the review provisions contained in Section 11 of the Act (45 U. S. C. Section 228k) (R. 3–11). The Brotherhood of Railroad Clerks and George M. Harrison, its president, were permitted to intervene as defendants (R. 277–278). The District Court granted summary judgment for the respondent (R. 292–293), and the Circuit Court of Appeals affirmed, Judge Frank dissenting (R. 302–323).

The facts disclosed by the record before the Board, which comprise the record before the Court (R. 18–271), may be summarized as follows:

Respondent is a Pennsylvania corporation all of whose stock is owned by the Pennsylvania Railroad Company, and whose principal officers are officers of the Pennsylvania (R. 59–61, 108, 133). It operates two warehouses, one in Pittsburgh and the other in East Liberty, within the Pittsburgh city limits, in buildings owned by the Pennsylvania and leased by it to respondent (R. 108–109, 133). Each building is on a rail siding, and part of the ground floor of

[1] The record before the Board consisted of questionnaires, affidavits and statements filed by the respondent company. The parties did not request that oral testimony be taken, but expressed satisfaction that the case be submitted on the record indicated (R. 249–250, 264). The case was argued orally before the Board by respondent and by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 20).

each is retained by the Pennsylvania as a freight agency (R. 108, 133).

At the East Liberty warehouse, respondent handles and stores only one commodity, carload sugar, all of which comes in and goes out over Pennsylvania's rails (R. 61, 108, 134). The sugar is handled by respondent under storage-in-transit privileges covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission (R. 61–62, 135–136). Incoming shipments are consigned to the owner care of respondent, the route being designated as "Penn RR—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privilege at East Liberty, Pa." (R. 134, 170, 171). Respondent unloads the sugar from the Pennsylvania's railroad cars upon their arrival and reloads the sugar into Pennsylvania's railroad cars upon their departure (R. 61, 109, 134, 135).

At its Pittsburgh warehouse, respondent handles freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-than-carload form, come in by rail, and approximately 60 per cent leave by rail (R. 108, 136–137). The services performed by respondent at the Pittsburgh warehouse are similar to those at East Liberty

in so far as car-load freight is concerned. Respondent loads and unloads the railroad cars as they come onto and depart from its platform, stores the railroad-transported goods, and performs other handling services in connection with the receipt and delivery of the railroad-transported goods (R. 62, 109–110, 133–134, 136–137). As to the less-than-carload freight, respondent, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by respondent on such platforms. In the case of outgoing less-than-carload shipments, respondent delivers the freight on to Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out. (R. 62, 109, 136–137).

Since 1922 the respondent has been a party to "salvage freight" agreements with the Pennsylvania whereby Pennsylvania turned over to respondent for resale and disposal damaged freight which had been refused or unclaimed by the owner (R. 62–63, 108, 137, 85–89, 179–184). For this service respondent retained 10 per cent of the gross proceeds plus certain costs and turned the balance over to Pennsylvania. The contracts contained provisions for the return of any such freight to Pennsylvania or the true owner, if his identity was ascertained or if he requested delivery before the goods were sold (R. 86–87, 101).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In affirming the judgment of the district court setting aside and annulling the decision of the Railroad Retirement Board that respondent is, and has been at least since August 28, 1935, an "employer" within the meaning of the Railroad Retirement Act.

2. In holding that Section 1 (a) of the Railroad Retirement Act reached only railroad subsidiaries or affiliates performing "acts done by or for the carrier" while its obligations persist".

3. In failing to hold that the Board's decision that respondent was an "employer" within the meaning of the Act was supported by substantial evidence and reasonably founded in law.

REASONS FOR GRANTING THE WRIT

1. On May 14, 1945 the United States Court of Appeals for the District of Columbia unanimously held that the respondent Duquesne Warehouse Company was an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act (52 Stat. 1094; 45 U. S. C. Section 351(a)), the language of which is identical with Section 1(a) of the Railroad Retirement Act. The Court of Appeals noted that "the Circuit Court of Appeals for the Second Circuit has held to the contrary in construing identical language in the Railroad Retirement Act", and stated that "we agree with the views of Judge Frank in his dissenting opinion filed in that case". *Railroad Retirement Board* v. *Du-*

quesne Warehouse Co., No. 8894, decided May 14, 1945 (App. D. C.). The facts,[2] the issues and the parties in the two cases are identical, and the conflict is obvious. A copy of the opinion of the Court of Appeals for the District of Columbia is set forth *infra*, pp. 12–19.

2. The Railroad Retirement Board and the Court of Appeals for the District of Columbia have construed "in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, * * * storage, or handling of property transported by railroad" as reaching services which are an integral part of or closely related—"functionally and economically" (R. 28)— to rail transportation. The court below, on the contrary, has construed the provision as denoting "transit" and covering only "acts done by or for the carrier while its obligations persist" (R. 305). Similar views have been expressed by the Circuit Courts of Appeals for the Fourth and Fifth Circuits. *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (C. C. A. 4); *Allen* v. *Ocean Steamship Co.*, 123 F. 2d 469 (C. C. A. 5).

It is important that the construction of this provision of the Act be finally determined by this Court. The issues of statutory interpretation raised are not limited in effect to this respondent or even to railroad controlled warehouse companies. Questions have

[2] By stipulation in the Unemployment Insurance Act case, the records before the Retirement Board in the two cases were the same.

been raised as to freight forwarding companies, car repair and manufacturing companies and other concerns controlled by railroads but perhaps not performing a part of a carrier's "obligations" to shippers. Furthermore, similar or identical language is found in the Carriers Taxing Act (50 Stat. 435, 26 U. S. C. Section 1532 (a)), the Railroad Unemployment Insurance Act (52 Stat. 1094, 45 U. S. C. Section 351 (a)) and the Railway Labor Act (48 Stat. 1185, 45 U. S. C. 151, First). Employers subject to those statutes are exempt from the Social Security Act (52 Stat. 1110–1111, 53 id. 1374, 42 U. S. C. Sections 409 (b) (9), 1107 (c) (8), 45 U. S. C. Section 363 (a)) and from the National Labor Relations Act (49 Stat. 450, 29 U. S. C. Section 152 (2)). The taxes and benefits are not the same under the railroad acts and the Social Security Act, and continued uncertainty as to which statute applies to particular employers and employees is obviously confusing to both as well as to the Government agencies concerned.

3. In view of the clear conflict and the importance of a determination by this Court it seems unnecessary to argue the merits of the case in this petition. The Board's position is set forth in the opinion of the Court of Appeals for the District of Columbia (printed *infra*, pp. 12–19), and in the dissenting opinion of Judge Frank in the court below (R. 309–323).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

HUGH B. COX,
Acting Solicitor General.

MYLES F. GIBBONS,
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MAY 1945.

APPENDIX A

Railroad Retirement Act of 1937, 50 Stat 307, as amended, 45 U. S. C. Section 228a (a):

SEC. 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also in-

clude railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railroad Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

APPENDIX B

United States Court of Appeals, District of Columbia

No. 8894

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, APPELLANTS

v.

DUQUESNE WAREHOUSE COMPANY, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued March 19, 1945—Decided May 14, 1945

Mr. Myles F. Gibbons, General Counsel, Railroad Retirement Board, with whom *Mr. David B. Schreiber*, Assistant General Counsel, and *Clara J. Cain*, Attorney, both of the Railroad Retirement Board, were on the brief, for appellant Railroad Retirement Board. *Mr. Charles B. Murray*, Assistant United States Attorney, Washington, D. C., also entered an appearance for Railroad Retirement Board.

Mr. Willard H. McEwen, with whom *Messrs. Frank L. Mulholland* and *Edward C. Kriz* were on the brief, for appellant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Mr. George R. Allen of the Bar of the Supreme Court of Pennsylvania, pro hac vice, by special leave of Court, with whom *Messrs. John Spalding Flannery* and *R. Aubrey Bogley* were on the brief, for appellee.

Before GRONER, Chief Justice, and MILLER and ARNOLD, Associate Justices

ARNOLD, *Associate Justice;* The Duquesne Warehouse Company, appellee, brought these proceedings to set aside the decision of the Railroad Retirement Board, appellant, which declared that appellee was an employer within the meaning of the Railroad Unemployment Insurance Act. The court below reversed the Board and gave a summary judgment in favor of appellee warehouse company. From that judgment this appeal is taken.

It is conceded that appellee is a wholly-owned subsidiary of the Pennsylvania Railroad Company. The Board found that appellee was operating two warehouses equipped with platform sidings and other facilities for the receipt, delivery, and other handling of in-bound and out-bound freight transported by the Pennsylvania Railroad Company. Both of these warehouses were served by Pennsylvania's railroad tracks. One warehouse at East Liberty, Pennsylvania, handles only sugar in carload lots which appellee unloads from or reloads on Pennsylvania's cars for the account of the shipper. The other warehouse, in Pittsburgh, handles diverse commodities coming in by both rail and truck in both carload and less-than-carload lots. Incoming less-than-carload shipments are unloaded and delivered to appellee on its platform by the railroad. Outgoing less-than-carload shipments are delivered to Pennsylvania's platform by appellee. Pennsylvania Railroad then issues its bill of lading, loads the freight and moves it out. Appellee's Pittsburgh warehouse is also an agency of the Pennsylvania Railroad to dispose of damaged freight which has been either refused by the shipper or is unclaimed. Appellee

also renders storage-in-transit service. This means that when a carload of freight is shipped to a designated point over the railway, then taken out of the cars and stored in the warehouse and then is subsequently reshipped over the railroad, it is entitled to the through rate to the designated point instead of the combination of local rates to the warehouse and thence to the transit point.

The various types of operations in which appellee is engaged in connection with Pennsylvania's railroad transportation are shown by the following analysis of appellee's revenues from 1936 to 1938:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$59,570.40	$95,911.60	$8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,085.17
	$119,646.34	$228,260.58	$28,889.86	$73,784.17

On the basis of these detailed findings the Board found generally that the appellee's operations were "intimately and integrally related to Pennsylvania's railroad transportation" and that appellee was engaged "in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, * * * and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad." The Board concluded as a matter of law that appellee was an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act and that compensated service rendered to appellee was creditable for the purpose of that Act.

The Act itself,[1] deleting the language not relevant here, defines an "employer" as follows:

> The term "employer" means * * * any company which is directly * * * owned * * * by one or more * * * carriers * * *, and which operates any * * * facility or performs any service (except * * * casual service; and the casual operation of equipment or facilities) in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * storage, or handling of property transported by railroad, * * *.

In its opinion the Board summarized its reasons for concluding that the operations of appellee made it an employer under the Act in the following language:

> In light of the general purpose of the * * * [Railroad Unemployment Insurance Act] and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroad; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate

[1] 52 Stat. 1094 (1938), 45 U. S. C. § 351 (a) (1940).

its rail system more successfully and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

We agree with the Board's construction of the Act.[2] It follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i. e., to cover the business of railroading as it is actually carried on. That the service rendered here is one habitually carried on by railroads as part of their business has been declared by the Supreme Court in the case of *Baltimore & Ohio Railroad Company* v. *United States*,[3] where the Court observed that

> All of the carriers "now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies." This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the

[2] In the case of *Duquesne Warehouse Co.* v. *Railroad Retirement Board* (decided March 12, 1945), the Circuit Court of Appeals for the Second Circuit has held to the contrary in construing identical language in the Railroad Retirement Act, 45 U. S. C. §228 (a) (1940). We agree with the views of Judge Frank in his dissenting opinion filed in that case

[3] 305 U. S. 507, 516–517 (1939).

other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages.

We cannot believe that operations habitually carried on by railroads in connection with their transportation service and intimately connected with that service are not part of the business of railroading which the Act is intended to cover.

We will briefly discuss the contentions of the appellee. In the first place, it argues that the descriptive phrase "service in connection with the transportation of property by railroad" refers only to property in actual movement over the rails. For example, part of the service rendered by appellee is the disposition of damaged freight refused or unclaimed by the shipper. Such freight has to be stored and disposed of. During such storage it is no longer in movement. Hence appellee argues that such service is not in connection with the transportation of property. Instead it is a separate and independent enterprise like the independent business of warehousing. This strained construction of the language is rendered even more difficult by the fact that the Act includes "service in connection with * * * *storage or handling* of property *transported* by railroad." The participle "transported" is certainly in the past tense. Appellee answers that by interpretation we must change the word "transported" to "being transported." This gets the desired result but it incidentally compels us to limit the term "storage" to enclosure in moving freight cars. This seems more ingenious than plausible.

A second contention of the appellee is that the phrase "in connection with the transportation of

property" was taken from the Interstate Commerce Act and must be limited to the kind of service which comes within the coverage of the Interstate Commerce Act. We can find no evidence that such a limitation was intended.[4] It is true that the section we are construing does not apply to carriers *unless* they are subject to the Interstate Commerce Act. But the Hearings make it clear that all services performed by such carriers as part of the business of railroading are covered. That business is, of course, not restricted to the obligations which a railroad is compelled to perform as a minimum requirement of the Interstate Commerce Act.

Finally, it is argued that the legislative history of the Act compels the narrow interpretation urged by appellee. In support of this the appellee quotes from the testimony of witnesses at the hearings. Individual opinion of witnesses at a hearing is of doubtful value in the interpretation of an act.[5]

[4] The only support for this interpretation is found in the hearings on the Railroad Labor Act of 1934 (45 U. S. C. § 151), which contained similar language. Hearings before the Committee on Interstate Commerce, U. S. Senate, 73rd Cong. 2d Sess. (1934), S. 3266, pp. 10–11. Mr. Eastman testified that he thought this would be a possible interpretation of the language of the proposed bill. The Chairman of the Committee stated that it is "rather poor legislation, isn't it, generally," for one act to be interpreted by another. Mr. Eastman then stated: "I am not sure the language as it stands does cover all that it is intended to cover." The bill as finally passed does not appear to hav included this limitation. The phrase "performs any service * * * in connection with the transportation of * * * property by railroad," is not included in the Interstate Commerce Act.

[5] *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493, 4 (1931).

But giving it full weight here, the testimony concerning the coverage of the Act goes no further than to show that the Act was not intended to be extended beyond services in connection with transportation which were habitual and intimately connected with railroad operations. For example, the operation of a water carrier was held not to be such a service in the case of *Walling* v. *Baltimore Steam Packet Company*.[6]

The Board's interpretation of the Act is unquestionably entitled to respect by this court.[7] In the case before us there seems no reason for setting it aside and every reason for affirming it.

The judgment of the court below will be reversed and the cause remanded to enter a summary judgment affirming the decision of the Railroad Retirement Board.

Reversed and Remanded.

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[6] 144 F. (2d) 130 (C. C. A. 4th, 1944).

[7] *Skidmore* v. *Swift & Company*, 323 U. S. 134 (1944), at page 140:

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

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